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DEVON L. UPSHAW,)
)
Appellant-Defendant,)
)
vs.) No. 02A04-0802-CR-48
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0709-FC-240

AUGUST 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

Devon Upshaw appeals his conviction in a bench trial of carrying a handgun without a license as a class C felony.

We affirm.

The sole issue for our review is whether the trial court erred in admitting the handgun in evidence.

On June 7, 2007, Upshaw drove past Fort Wayne Police Department Officer Shane Pulver at an excessive rate of speed. Officer Pulver, who also noticed that Upshaw's vehicle had a broken brake light, initiated a traffic stop. Upshaw stopped his vehicle in the center lane of a three-lane one-way street and refused to pull over to the side of the street when Officer Pulver directed him to do so.

Upshaw gave the officer conflicting answers about who owned the vehicle but was able to provide his driver's license, registration, and proof of insurance. When Officer Pulver checked Upshaw's identification on his police computer, the officer received alerts that Upshaw was a known armed resister who was involved in gang activity. Officer Pulver also learned that Upshaw's permit to carry a firearm was still pending and not yet valid.

Officer Pulver returned to Upshaw's vehicle and issued him an oral warning about his broken taillight. Before Upshaw drove away, Officer Pulver asked if he could search Upshaw's vehicle. Upshaw consented to the search. Based upon the computer alerts and for the purpose of officer safety, Officer Pulver asked Upshaw to exit the vehicle so the officer could pat him down to search for weapons. While he positioned Upshaw for the pat down, Officer Pulver asked Upshaw if he had any weapons on his person. Upshaw

admitted that he did. During the pat down, Officer Pulver discovered a .45 caliber handgun with a bullet in the chamber.

The State charged Upshaw with carrying a handgun without a license as a class C felony because of Upshaw's prior conviction for the same offense. Upshaw filed a motion to suppress the handgun, which the trial court denied during trial. He was subsequently convicted as charged in a bench trial, and he appeals the conviction.

At the outset we note that because Upshaw appeals following a trial, the issue before this court is whether the trial court erred in admitting the handgun into evidence. *See Pearson v. State*, 870 N.E.2d 1061, 1064 (Ind. Ct. App. 2007), *trans. denied*. The admission of evidence is within the broad discretion of the trial court. *Id.* We will reverse a trial court's ruling on the admissibility of evidence only if the trial court abused its discretion. *Id.* An abuse of discretion will be found if the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

Upshaw does not challenge the propriety of the initial stop. Rather, his sole contention is that the pat-down search was not reasonable because Upshaw "had given Officer Pulver no reason to be concerned for his safety." Appellant's Br. at 9.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution protect an individual's privacy and possessory interests by prohibiting unreasonable searches and seizures. *Howard v. State*, 862 N.E.2d 1208, 1210 (Ind. Ct. App. 2007). Generally, a lawful search must be conducted through a judicially issued search warrant. *Id.* When a search is conducted without a warrant, the State has

the burden of proving that an exception to the warrant requirement existed at the time of the search. *Id.*

The United States Supreme Court established one such exception in *Terry v. State*, 392 U.S. 1 (1968), which holds that a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause, if, based on specific and articulable facts together with reasonable inferences from those facts, an ordinarily prudent person would reasonably suspect that criminal activity was afoot. *Id.* Reasonable suspicion is determined on a case-by-case basis by looking at the totality of the circumstances. *Id.*

In addition to detainment, *Terry* permits a police officer to conduct a limited search of the individual's outer clothing for weapons if the officer reasonably believes the individual is armed and dangerous. *Id.* In other words, an officer may conduct a search for weapons without obtaining a search warrant if the officer reasonably believes that he or others may be in danger. *Pearson*, 870 N.E.2d at 1065. An officer need not be absolutely certain that an individual is armed. *Id.* In determining the reasonableness of the officer's actions, due weight must be given, not to the officer's inchoate and unparticularized suspicions, but to the specific reasonable inferences that the officer is entitled to draw from the facts in light of his experience. *Id.*

Here, our review of the evidence reveals that when Officer Pulver checked Upshaw's identification on his police computer, the officer received alerts that Upshaw was a known armed resister who was involved in gang activity. This information justified the minimal intrusion imposed by a limited pat-down search for weapons. *See*

id. (holding that evidence the officer knew the defendant had injured another in a prior altercation and had been in possession of a weapon on another occasion justified a pat-down search). Because we find the pat down search was justified, the trial court did not err in admitting the handgun into evidence.

Affirmed.

DARDEN, J., and ROBB, J., concur.